No. 819

# In the Supreme Court of the United States

OCTOBER TERM, 1960

CORY CORPORATION AND MITCHELL MANUFACTURING COMPANY, PETITIONERS

v.

ERNEST J. SAUBLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

LOUIS J. OBERDORFER,
Assistant Attorney General,

Department of Justice, Washington 25, D.C.

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 3 |
| Argument | 5 |
| Conclusion | 10 |


## CITATIONS


| | |
|---|---|
| Statutes: | |
| Internal Revenue Code of 1939: | |
| Sec. 3405 (26 U.S.C. 1952 ed., Sec. 3405) | 2 |
| Sec. 3405(c) (26 U.S.C. 1952 ed., Sec. 3405(c)) | 2, 3 |
| Sec. 3443(d) (26 U.S.C. 1952 ed., Sec. 3443(d)) | 8 |
| Internal Revenue Code of 1954: | |
| Sec. 4111 (26 U.S.C. 1958 ed., Sec. 4111) | 2, 3 |
| Sec. 6416(a) (26 U.S.C. 1958 ed., Sec. 6416(a)) | 8 |
| Revenue Act of 1926, Sec. 1108(b), c. 27, 44 Stat. 9, 114 | 8 |
| Miscellaneous: | |
| Rev. Rul. 54-462, 1954-2 Cum. Bull. 410 | 3 |
| S.T. 934, 1948-2 Cum. Bull. 180 | 3 |
| T.D. 6423, 1959-2 Cum. Bull. 282 | 5 |




594694 - 61

# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 819

CORY CORPORATION AND MITCHELL MANUFACTURING COMPANY, PETITIONERS

*v.*

ERNEST J. SAUBER

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The prior opinion of this Court remanding the case to the Court of Appeals is reported at 363 U.S. 709. The opinion of the Court of Appeals following the remand (Pet. App. 1a–12a) and the separate opinion of Judge Duffy dissenting from the denial of a rehearing *en banc* (Pet. App. 13a–14a) are reported at 284 F. 2d 767.

### JURISDICTION

The judgment of the Court of Appeals (Pet. App. 15a) was entered on November 21, 1960. The order denying petitioners' application for a rehearing *en banc* was entered on January 6, 1961. The petition

for a writ of certiorari was filed on March 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTION PRESENTED

1. Whether the Court of Appeals has correctly construed certain revenue rulings (subsequently superseded) classifying air-conditioning units for excise tax purposes.

2. Whether the Court of Appeals, following this Court's remand for further proceedings, complied with the mandate of this Court.

## STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 3405. TAX ON MECHANICAL REFRIGERATORS, QUICK-FREEZE UNITS, AND SELF-CONTAINED AIR-CONDITIONING UNITS.
>
> There shall be imposed on the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to 10 per centum of the price for which so sold:
>
> * * * * *
>
> (c) *Air-conditioners.*—Self-contained air-conditioning units.

(26 U.S.C. 1952 ed., Sec. 3405.)

Internal Revenue Code of 1954:

> SEC. 4111. IMPOSITION OF TAX.
>
> There is hereby imposed upon the sale of the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof) by the manufacturer, producer, or importer a tax equiv-

alent to the specified percent of the price for which so sold:

* * * * *

*Articles Taxable at 10 Percent.*—Self-contained air-conditioning units.
(26 U.S.C. 1958 ed., Sec. 4111.)

STATEMENT

This refund suit seeks the recovery of manufacturers' excise taxes paid to the United States by petitioners on the sales of two air-conditioning units sold in 1954 and 1955. The primary question raised by the litigation was whether these sales were subject to the excise tax imposed on sales of "self-contained air-conditioning units" by Section 3405(c) of the Internal Revenue Code of 1939 and its successor, Section 4111 of the 1954 Code. In contending that their air conditioners were not subject to the tax, the taxpayers relied upon administrative rulings published by the Commissioner in 1948 and 1954.[1] So far as pertinent, these rulings provided that the type of air conditioner subject to the tax was a self-contained unit which had "a total motor horsepower of less than 1 horsepower * * *."

This issue in turn depended upon the meaning of the term "horsepower" as used in the rulings. It was stipulated below that taxpayers' units developed an *actual* horsepower in excess of one under various

[1] S.T. 934, 1948–2 Cum. Bull. 180; Rev. Rul. 54–462, 1954–2 Cum. Bull. 410. S.T. 934 was in force when the first sale involved in this litigation was made on May 28, 1954, and Rev. Rul. 54–462 was in force when the second sale was made on August 8, 1955.

sets of engineering test conditions. It was also stipulated that the units were labeled and sold to the public as ¾ horsepower units, the so-called *nominal* horsepower of the units. Thus, if the rulings were construed to adopt an *actual* horsepower test, they purported to except taxpayers' units from the tax; but not so, if deemed to adopt a *nominal* horsepower test.

The District Court construed the rulings as framed in terms of *actual* horsepower and therefore effective to exempt taxpayers' units from the tax. The Court of Appeals reversed, holding that the units were taxable under the statute and that the rulings, insofar as they imposed a horsepower test, were void. Hence, the Court of Appeals found it unnecessary, on its first review, to construe the rulings.

After granting taxpayers' petition for certiorari, this Court reversed and remanded, holding that a horsepower test was permissible and that the rulings were not void. It directed the Court of Appeals to resolve "any other questions which may remain." 363 U.S. at 712.

On remand, after considering the relevant evidence, the Court of Appeals held that the rulings must be construed in terms of *nominal* horsepower, and that taxpayers' units were taxable. The court also held that the parties' stipulation that the suit was "a prototype or test case" the outcome of which would govern taxability of some 50,000 other air-conditioning units sold by taxpayers was not to be given effect. Thus, taxpayers were left free, in subsequent

litigation, to raise any defenses relating to units other than the two units embraced in this suit.

## ARGUMENT

The only significant issues—the validity of the Commissioner's rulings and his authority to promulgate them—have already been resolved by this Court. The Court of Appeals, in execution of this Court's mandate, has now construed the rulings. As to this issue of construction, there is no conflict, and, since the rulings in question have been superseded,[2] the issue does not have continuing importance. Moreover, by denying full effect to the parties' stipulation that this is "a prototype or test case", the Court of Appeals has enabled taxpayers, in subsequent litigation, to raise other defenses available to them in resisting imposition of the tax on other units sold. No issues remain which would warrant further review by this Court.

1. Although this Court has expressly held that the revenue rulings here involved are "not void" (363 U.S. at 711), taxpayers' petition reargues a contention advanced throughout this litigation, *i.e.*, that if the rulings adopt a nominal horsepower test, they are void. In view of the remand to the Court of Appeals to determine which of the competing constructions was correct, it seems clear that this argument is foreclosed. As the dissenting opinion of Mr. Justice Clark correctly observed (363 U.S. at 716), "It [the majority] simply remands the case to the

[2] New Treasury Regulations promulgated in 1959 and applicable to the future eliminate the horsepower test. T.D. 6423, 1959-2 Cum. Bull. 282.

Court of Appeals for a determination of whether the ruling meant by its language to refer to actual horsepower, as the District Court found, or to the manufacturer's rated horsepower as posted on the motor itself."[8]

2. The decision below is correct. As this Court pointed out in its opinion, "the factor of horsepower" may have had some relation to "size", and "size" might have been relevant to what was then "a self-contained air-conditioning unit." (363 U.S. at 711.) Moreover, as the Court also noted, industry representatives asserted to the Commissioner that horsepower "was a factor relevant to the definition of the statutory term as they understood it." (363 U.S. at 711–712.) Adopting this approach, the Court of Appeals has fully analyzed the evidence of record. It found that "the Commissioner had been given the assurance of the industry that a *rated* [*i.e.*, nominal] motor horsepower test of less-than-one-horsepower, to use the words of York, "is sufficiently broad in its scope to include without exception all self-contained air conditioning units which are now being manufactured'" (Pet. App. 6a). It therefore concluded that the rulings must be construed to adopt a nominal horsepower test. Any other conclusion would have been inconsistent with the practice of air conditioning manufacturers in relying upon the labeled

[8] This Court's reference (363 U.S. at 712) to a District Court finding as to the meaning of horsepower "among engineers" obviously does not support petitioner's suggestion that this Court has already construed the ruling as one which refers to horsepower in its engineering sense. Engineering usage is but one of numerous relevant considerations.

horsepower attached to the unit [nominal horsepower]—the only horsepower figures available to them—and with the purpose of the Commissioner and the industry to state a definition which would reach all self-contained units then being manufactured.[4]

3. In the District Court, the parties stipulated that these actions were "prototype or test cases" to determine not only whether the two air conditioning units specified in the pleadings were subject to the excise tax, but also whether some 50,000 additional units sold by taxpayers,[5] stipulated to be "similar" to the two in suit, were also subject to the tax. (R. 40.)[6] Under our original understanding of this stipulation, a favorable decision on the merits in this suit would have foreclosed the taxpayers from defending imposition of the tax on the 50,000 additional units. Although the Court of Appeals has adopted our construction of the rulings, it has declined to give effect to the stipulation that the suit is a "test case" and has left it open to taxpayers, in subsequent litigation concerning the 50,000 additional units, to litigate further. We cannot perceive how petitioners can object to a ruling which, far from foreclosing them, so favors them.

---

[4] Indeed, if nominal horsepower were not the test, one of the two units involved in this litigation, indisputably a self-contained unit, would not be subject to the tax.

[5] This figure of 50,000, not in the stipulation itself, is an estimate used by counsel for petitioners in brief and argument. The tax on these units, although assessed by agreement of the parties, has not yet been collected.

[6] Record references are to the original record in this Court which has been recertified and filed with the present petition.

Indeed, the Court of Appeals has adopted the very construction of the stipulation which petitioners urged upon this Court in oral argument and in their supplemental memorandum filed thereafter. At that time, taxpayers contended that the issue whether they had collected the tax from their customers on the 50,000 additional units sold was not in the case and that this was not a "test" case for such purposes. That issue, if in the case, was significant in two respects. *First,* to prevail in an excise tax refund suit, the manufacturer must, at the threshold, satisfy one of three statutory conditions: (a) establish that he has not collected the tax from the vendee, or (b) prove that he has repaid the tax to the vendee, or (c) file with the Commissioner written consent of the purchaser to allowance of the refund.[7] The purpose of these requirements is to prevent the manufacturer from obtaining a windfall, *i.e.,* the refund of a tax which in equity belongs to the vendee who has actually paid it. *Second,* in order to rely on a special statute which prohibits retroactive changes in position by the Commissioner in the excise tax field, the manufacturer must show reliance, to his detriment, upon an existing ruling of non-taxability;[8] here, that taxpayers, in reliance upon the rulings, failed to collect the tax from the vendees. The Court of Appeals, by limiting the effect of the stipulation, left these matters for future litigation. This is precisely the position which taxpayers took in their supple-

[7] Internal Revenue Code of 1939, Section 3443(d); Internal Revenue Code of 1954, Section 6416(a).

[8] Section 1108(b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 114.

mental memorandum to this Court filed after argument (p. 4):

> * * * there was no identification of the units whose taxability turned on the decision of the refund suits. There was no evidence as to how or in what manner they were sold. There was, in short, no issue of estoppel presented and no reason for petitioners to have prepared for trial on that issue. They did not do so.

We stated to this Court in our post-argument memorandum (p. 5):

> In view of petitioners' assertion that they have never had an opportunity to show as a fact that they failed to collect the tax on the 50,000 units in reliance upon the Treasury rulings, and to argue the legal consequences which would flow from such a finding of fact, the Government agrees that such an opportunity should not be denied them. Accordingly, to avoid any possible unfairness, we accept petitioners' interpretation of the stipulation, *i.e.*, that this is a test case only in the sense that a finding whether air-conditioners of the physical characteristics of those in suit are taxable under the statute and rulings, or both, will control with respect to the other units whose physical characteristics are stipulated as similar, and that it will still be open to petitioners to show, as to the 50,000 units covered by the stipulation, that the Government is estopped to impose the tax because of petitioners' failure to collect it from their customers in reliance on then-existing administrative rulings holding no tax was due.

The Court of Appeals has followed that course. As it noted in its opinion, the record is barren of proof on the question whether taxpayers collected from their vendees the excise tax due on the 50,000 additional units sold. This being so, a conclusion cannot be drawn as to whether taxpayers, in relation to those units, can comply with statutory conditions to refund imposed by the Revenue Codes or the Revenue Act of 1926. The result of the Court of Appeals' action is to return the case, in this aspect, to the posture urged by taxpayers themselves. The issue on which they offered no proof because, in their view, it was not in the case—*i.e.*, whether they collected the tax from vendees on the 50,000 additional units—has been left open. If this Court denies certiorari, the Government will be free to collect the excise tax it believes is due on the 50,000 units. Petitioners will then, upon appropriate proof that they bore the burden of the tax, be free to pursue the estoppel issue which they have always claimed was reserved for subsequent litigation. The Government will be free to show, on the other hand, that there is no basis for estoppel. Further intervention by this Court at this time can serve no useful purpose.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*

LOUIS F. OBERDORFER,
*Assistant Attorney General.*

MAY 1961.

U.S. GOVERNMENT PRINTING OFFICE 1961